Victims and Prisoners Bill

Briefing for MPs – Committee Stage

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

The Bar Council believes that the proposal in the Victims and Prisoners Bill to allow the Secretary of State to usurp the role of the Parole Board in decisions about parole in the most serious cases are unnecessary, poorly defined and offend against the separation of powers, and will introduce an unwanted element of politicisation. Furthermore, the proposals to 'disapply' the effect of Convention rights in respect of parole decisions are similarly unnecessary, unwelcome and likely unworkable.

The Bill

The area of particular concern to the Bar Council is **Part 3** of the Victims and Prisoners Bill which proposes significant changes to the parole system. In particular:

- **Clauses 35-41** of the Bill create (a) a power for the Parole Board to refer a parole decision in respect of 'top-tier cases' (e.g. murder, terrorism, rape) to the Secretary of State (SoS) 'for any reason, including where it considers that… it is unable adequately to assess the risk to the public' and (b) a power to the SoS to require the Parole Board to so refer a prisoner's case to herself.

There is a proposed right of appeal from the SoS's decision to the Upper Tribunal, but only on grounds of illegality, *Wednesbury*-type unreasonableness / irrationality, procedural impropriety, fundamental error of fact, or on the basis that there is in fact no more than a minimal risk of an offence causing serious harm. The appeal is therefore more akin to a review than a merits-based appeal.

Sir Bob Neill MP, Chair of the HoC Justice Select Committee wrote to the Lord Chancellor on 7 June setting out objections to these provisions. The Select Committee had heard evidence that the Parole Board did not want, and would likely never use, this power themselves: if the Parole Board were not satisfied that the test for release was met, then they would not direct the release of the prisoner. This provision therefore appears to the Bar Council to be simply a mechanism for the SoS to arrogate the decision-making power to themselves if and when they feel it is it appropriate. Sir Bob observed that the proposal (a) offends against the separation of powers between the judiciary (defined as

including independent and impartial tribunals like the Parole Board) and the executive and (b) there is no test set out for how the SoS would make the decision to direct referral to themselves, making it likely unlawful on the grounds of arbitrariness.

Separately, His Honour Peter Rook KC (an extremely well-respected former Old Bailey judge and current Vice-Chair of the Parole Board) has observed that it would be preferable, given the likely need for calling of evidence and witnesses etc, to provide that any appeal is to the Court of Appeal Criminal Division, which has experience of such matters, rather than to the Upper Tribunal which does not.[1]

We believe those objections from Sir Bob are well founded: these proposals do offend against the principle of the separation of powers. Historically, the SoS used to have the authority to make these decisions themselves - and could similarly reject Parole Board advice/decisions - but that effectively ended 20 years ago with the Parole Board (Transfer of Functions) Order 1998 and the Criminal Justice Act 2003.[2] The proposals abolish decades of a desirable separation of powers not for any legal or practical reason, but simply to give the Government the power to make its own decision (presumably only for political reasons, given the Parole Board, staffed by those with training and experience in the area, makes their own expert decision about public safety grounds) in respect of the most high-profile prisoners. Further, the quality of such decisions is likely to be significantly poorer than if they were made by the expert, independent and impartial tribunal specifically tasked with this function.

- **Clauses 42-43** refer to the disapplication of section 3 of the Human Rights Act 1998 ('HRA') (duty to give effect to legislation in way compatible with Convention rights) in relation to decisions concerning parole.

This raises obvious issues with the rule of law. Fundamental freedoms such as a proportionate right to respect for family life etc, even for offenders, are now well-established parts of our national life. There is no evidence of any systemic impairment due to the HRA of the Parole Board's ability to make high-quality, safe, decisions about prisoners – no statistical analysis of recidivism/public safety concerns from prisoners released due to interpretation of legislation in line with Convention principles. In addition to the principled objection, it is worth considering whether these provisions have the remotest chance of being effective, if what is really intended by them is the disapplication of the Article 5 ECHR right to liberty, or the Article 6 ECHR right to a fair trial. The common law has an enduring ability to protect such rights, not least through the mechanism of *habeas corpus*. Finally, there is an obvious tension, in a Bill specifically providing for the possibility that decisions are made otherwise than in accordance with Convention rights, with the (then) Lord Chancellor's statement under s.19(1)(a) HRA that in his view '*the provisions of the Victims and Prisoners Bill are compatible with the Convention rights.*'

[1] The Bar Council notes that, in a recent interview with BBC Radio 4's Law in Action, the Lord Chancellor did indicate an appetite for reconsidering the issue of which would be the appropriate appeal/review forum.

[2] The Secretary of State's discretionary power remained in respect of a small and diminishing category of prisoners who had been sentenced as long-term prisoners under the Criminal Justice Act 1991, see *R (Black) v Secretary of State for Justice* [2009] UKHL 1. That power was also finally transferred to the Parole Board by s.145 of the Coroners and Justice Act 2009 with effect from 3 December 2012

- **Clauses 48-50** prevent whole-life prisoners from marrying/entering into civil partnerships.

Although there may be a range of views on this issue, such a restriction on the right to private /family life would have to be justified as being necessary and proportionate. It is not clear to the Bar Council that the case has been made out.

Third Party Material

We also understand that new rules about Third Party Material (TPM) are to be added to this Bill at the committee stage as a result of the government's 'End to End Rape Review'. While the text of such provisions has not yet been published, we understand that the new rules are likely to

(a) apply to all criminal investigations (not just rape and serious sexual offences)

(b) apply to victims (meaning complainants) of criminal conduct only

(c) create a statutory duty to request from a third party about victims only that material which is necessary and proportionate in respect of a reasonable line of enquiry

(d) require police to be clear about the information being sought, when such requests are made.

(e) require police to inform victims when such requests are made of third parties about them

The Bar Council believes that what is being proposed as TPM, will likely add nothing, in reality, to the current regimes regarding disclosure (under the Criminal Procedure and Investigation Act 1997) and data protection. What is actually required is not more verbose statutory language but greater resourcing of police for processing of TPM (where the concern is delay) and better training (to deal with the issues regarding necessity / proportionality and the importance of keeping complainants and victims suitably informed).

The Bar Council
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